to attack another bull and causing similar damage. Once that has been established, the plaintiff succeeds under the scienter rule.

It was also argued that the mother-in-law who was then looking after the cattle and the bull was not the servant of the defendant so as to found liability against the defendant. That argument is only significant and relevant if the knowledge of the mother-in-law is to be imputed to the defendant on a basis of master and servant relationship. However, the present case is different as the defendant himself has knowledge of the mischievous propensity of the bull. It therefore follows that argument is not tenable. However, the plaintiff's claim is based on negligence and it is on that aspect of the case that this present appeal has to be decided. Paragraph 6 of the plaintiff's statement of claim states:

"The defendant was negligent to the extent that he did not exercise proper care and control of such a bull when grazing near the main thoroughfare".

It is a perfectly clear principle of law that a man may be involved in liability for damage done by his animals under the general principle of negligence. In such case the plaintiff must prove a duty owed to him by the defendant. It is also perfectly clear that he is liable if his animal damaged his neighbour's property. Who is one's neighbour has been judicially defined. Lord Atkin in the celebrated case of *Donoghue* v. *Stevenson* [3] stated the law as follows:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have been in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question".

That classic statement bears reference to 'persons' but I have no doubt that includes his property as well. Applying that test, it is beyond doubt that the defendant owes a duty to the plaintiff to take reasonable care not to damage the plaintiff's property which is in the near neighbourhood. On the facts as found by the learned president the defendant has failed to take reasonable care as a result of which the plaintiff's bull was injured.

It was submitted that the cattle including the bull were looked after by the defendant's mother-in-law and therefore the defendant cannot be imputed with liability because the mother-in-law was not his servant. It was said that the mother-in-law should be so sued or joined as defendant. It is common ground that a man may vicariously be liable through the act of his servant and the dominant consideration in that case is the well known principle that the servant must be subject to the control and direction of his employer in respect of the manner in which his work is to be done. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid but, in my opinion, that is not essential. One person may be the servant of another on a single occasion and for an individual transaction provided the element of control and supervision is present. Moreover, the service may be merely gratuitous, as where a child acts *de facto* as the servant of his father or the owner of a vehicle asks a friend to drive it. The test of service is not physical control but the right to control. The right of control may be deduced from the circumstances of each case, such as the fact that the owner of a motor-car remains in it while allowing another to drive, *Samson* v. *Aitchison.* [4] Even if there is no right of control, the owner of a vehicle may be liable if he has delegated to the other the duty of looking after it (*Hewitt* v. *Bonvin;* [5] *Norton* v. *Canadian Pacific Steamships Ltd* [6]) or if it is being used partly or wholly on the owner's business or for the owner's purposes, *Ormood* v. *Crosville Motor Services Ltd.* [7] On the analogy of the above principle it is beyond doubt that the mother-in-law was looking after the cattle and bull for the defendant's purposes. It is equally clear that the defendant had an interest in them. Therefore, on the facts as found by the learned president there is ample evidence to justify his conclusion that the defendant was negligent in allowing his bull to cause damage to the plaintiff's bull.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Athi Nahappan & Co.*

CHONG SIN ONN v. KUCHING MUNICIPAL COUNCIL

[O.C.J. (Harley Ag.C.J. (Borneo)) July 20, 1966]

[Kuching — Civil Suit No. K. 28 of 1966]

Tort — Obstruction — Construction of a rail by local authority — Interference with access to premises — No proof of pecuniary damage — Statutory authority — Kuching Municipal Ordinance (Cap 116), s. 84.

The plaintiff sought a declaration that the defendants a local authority were not entitled to keep a rail in front of his clinic between it and the street and he asked for an order that the defendants pull down the rail and an injunction to restrain defendants from obstructing his patients and himself and his staff from getting into the clinic. The plaintiff did not prove that he had in fact suffered any pecuniary loss or that his practice as a dentist was affected. The defendants denied that the plaintiff's enjoyment of his premises had been adversely affected or interfered with and claimed that the rail was properly constructed as part of the authorised powers given to the defendants.

Held: as (a) on the facts of the case the plaintiff's access to his clinic had not been substantially interfered

with; (b) the defendants had not exceeded their authority in constructing the rail which was intended to channel pedestrians along a path of safety; and (c) as the plaintiff had not suffered any pecuniary damage, the plaintiff's claim must be dismissed.

Cases referred to:—

(1) *Ogston* v. *Abeideen District Tramways Co.* [1897] A.C. 111.

(2) *Barber* v. *Penley* [1893] 2 Ch. 447.

(3) *Vanderpant* v. *Mayfair Hotel Co.* [1930] 1 Ch. 138.

CIVIL SUIT.

T. O. Thomas for the plaintiff.

S. Sahathevan for the defendant.

Harley Ag.C.J. (Borneo) (delivering oral judgment): In this case the plaintiff is the tenant occupier of a house which is No. 76, India Street, Kuching. Actually, the part of his premises, that is to say, the dental clinic, in which this court is interested faces Power Street and the market place, and the sole entrance to the clinic is from Power Street. Now the plaintiff's claim is that his entrance was obstructed by a rail which was placed between him and the street. The plaintiff says that the defendant has no power or authority to put up that rail and that since it constitutes an obstruction it interferes with his enjoyment of his premises and gets in the way of patients who would wish to come to him for business purposes. Moreover, the plaintiff complains that he was not given any warning nor was there any chance of discussion before the work started. He says that during the short period of the work, and ever since, his access to and from his clinic is blocked by crowds of people and bicycles and even motor-cycles. He claims a declaration that the defendant is not entitled to keep the rail in front of his clinic. He claims that the construction of the rail is *ultra vires* the Kuching Municipal Council's powers. He claims an order that defendants pull down the rail and an injunction to restrain defendants from obstructing his patients and himself and his staff from getting to the clinic.

The defence is a denial that plaintiff's enjoyment of his premises is adversely affected or interfered with and the defendant also claims that the rail is properly constructed as part of the authorised powers given to the defendant. The defendant does virtually admit — perhaps I should say after hearing the evidence that he expressly admits — that no previous notice was given to the plaintiff nor was the matter discussed with him but the defendant says notice and discussion were superfluous.

Now the first thing to note is that the defendant has statutory powers to construct and alter roads in accordance with section 84 of the Kuching Municipal Ordinance (Chapter 116). Acccording to the Ordinance the definition of "road" is wide and includes street, footway or passage. I must agree certainly with Mr. Thomas who has most helpfully assembled twenty-seven authorities on the point that statutory authority is no defence if the defendant goes beyond his powers or exercises them unreasonably. We must of course make some inquiry into the reason or object of this construction. I do not think that it would be easy to follow this case without knowing the situation which is at a busy crossroads at one corner of the market place. If this case should go to higher authority I think counsel would be well advised to have a plan to scale drawn of the site. As for myself, I have had the advantage this morning of looking at the premises and seeing how the situation affects the position of the parties. Before the construction complained of, people going in and out of the clinic had direct access to, and egress from, the road. Now there is a footpath and a rail. There is also a lot of recent construction dating from about the same period close to plaintiff's premises and close to the market place. In between the clinic and a new large building known as Electra House there is a newly constructed parking place which from my own observation is packed with bicycles and where motor-cycles are parked. I have not the slightest doubt that at the rush hours, that is when people come to work and when they leave work, morning and afternoon, there is a crowd of pedestrians and various cyclists milling around the entrance to the clinic. So that we do get this position that as a result of the recent construction complained of and of other recent constructions, the flow of pedestrian traffic and indeed of bicycles immediately at the entrance to the clinic is immeasurably increased. The plaintiff, his assistants and no doubt his patients, although his patients do not always come at rush hours, do have to push their way through the crowd to get into their own entrance and up their own stairs. But this is a development to be expected in an expanding city. The increased crowds are undoubtedly due to some extent to the construction of Electra House with all its new shops. We heard evidence that office boys from these and other shops pass by at all hours of the day.

Now as I have already said I have had the advantage of a very compact and relevant list of authorities supplied to me by the courtesy of Mr. Thomas and these authorities are filed with the record in case reference to them should be made hereafter. I think that it might be worthwhile to cite three further authorities not mentioned to me in the course of the hearing. The first is the case of *Ogston* v. *Aberdeen District Tramways Company,*[1] and at page 115 I quote from the judgment of Lord Halsbury, Lord Chancellor, as follows:—

"If the question had arisen in England, I think some doubt might be entertained whether the obstruction as proved was such that a private person could sue without further proof of peculiar damage to himself . . .".

Now amongst the authorities there are cases when proof of inconvenience is sufficient to found a claim for general damages. There are other authorities which tend to show that in a case such as the present one the plaintiff should prove his peculiar damage just as in other cases where special damage has to be proved. The plaintiff has not in fact proved that he suffered any pecuniary loss or that his practice is affected. I may say something more about that further on.

Now in *Barber* v. *Penley*(2) a whole host of authorities are assembled by North J. and they are of general interest in considering the instant case but I will not go through them in detail.

Finally I would like to refer to the case of *Vanderpant* v. *Mayfair Hotel Co.*(3) When the Mayfair Hotel was built the plaintiff, who had a nearby private residence, complained that his access was obstructed and that he was deprived of reasonable use of the public highway and complained also of other nuisances. Now in that case the decision was that the plaintiff must prove that he has sustained particular and substantial and direct damage beyond the general inconvenience and injury to the public. The question on nuisances generally is very often one of degree. Now on the facts of this case I have come to the conclusion that plaintiff's access to his clinic has not been substantially interfered with. When a town becomes more busy owing to a variety of reasons, and the number of pedestrians increases, naturally one has to struggle through the crowd in order to get where one wants to go. That is the case in all cities. Next, I do not think that the council has exceeded its authority. I think that there was a reason for constructing this path and rail, namely to channel the pedestrians along a path of safety and to stop them mixing with wheeled traffic in the main highway. I do not think that the Municipal Council has exercised its powers unreasonably so as to invade the private rights of property, and finally, and I do think that this is material in this case, I do not find that the plaintiff has suffered any pecuniary damage.

In the circumstances the plaintiff's claim is dismissed with costs. I am grateful to counsel on both sides for putting their arguments so ably and succinctly.

Claim dismissed.

Solicitors: *Thomas & Co.; Battenburg & Talma.*

THONG SEONG POH & ANOR. v. THONG MENG TEE

[A.C.J. (Ismail Khan J.) July 22, 1966]

[Seremban — Civil Appeal No. 3 of 1964]

Landlord and Tenant — Statutory tenant — Tenant assigning his tenancy — Landlord entitled to possession — Costs.

This was an appeal against the decision of the president, sessions court, granting the respondent, the landlord of controlled premises, an order for possession of the premises against the appellants. The first appellant was the tenant of the premises but the respondent had given notice terminating the tenancy. Subsequently it appeared the first appellant transferred the tenancy of the premises to the second appellant.

Held: since the first appellant was a statutory tenant, he had only a personal right of occupation and could not assign this right and therefore the learned president was right in giving possession of the premises to the respondent.

Cases referred to:—

(1) *Samrose Properties Ltd.* v. *Gibbard* [1958] 1 W.L.R. 235.

(2) *R.* v. *Cook* [1959] 2 W.L.R. 616 at p. 622.

CIVIL APPEAL.

Edgar Joseph Jr. for the appellants.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Ismail Khan J.: This is an appeal against the decision of the president of the sessions court at Kuala Pilah granting the landlord of controlled premises an order for repossession against a tenant holding over after due notice to quit.

The respondent, plaintiff in the action, was the owner of the premises No. 45, Main Road, Bahau, which he purchased in 1947. The first appellant was then already in occupation of a half portion of the ground floor as a shop and his family also resided therein. The second appellant is his son. They were both made defendants in the action.

In 1950 the first appellant applied to the Rent Assessment Board for reduction of rent and he succeeded in having it reduced from $37.50 to $32 per month.

On 7th July, 1951, the respondent served notice on the first appellant determining his tenancy. The latter replied on 9th July, 1951, that he was unable to find other suitable accommodation. The respondent was unable to take any action by reason of the Control of Rent Ordinance, 1948, then in force. Nevertheless, the effect of the notice was undoubtedly to convert the contractual tenancy into a statutory one — see section 15 of the 1948 Ordinance, now section 20 of Ordinance 1956.

The first appellant was trading under the firm name "Chip Thye". On 15th November,